IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

JOHN W. HILL,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondent.

No. 665.

BRIEF FOR RESPONDENT

In Opposition to Petition for Certiorari to the Supreme Court of Missouri.

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OPINION BELOW.

The opinion of Division One of the Supreme Court of Missouri, subsequently adopted en banc, will be found in the record beginning at page 207. It has not yet been officially reported.

STATEMENT.

Petitioner's action is under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51) to recover damages for personal injuries. A jury trial resulted in a verdict for petitioner in the sum of Thirty-seven Thousand Seven

Hundred and Twenty-one Dollars ($37,721.00) (R. 188, 189). The trial court found that the verdict was grossly excessive and was the result of passion and prejudice against respondent, and ordered that unless petitioner would remit Twelve Thousand Seven Hundred and Twenty-one Dollars ($12,721.00) of the verdict a new trial should be granted (R. 192). Petitioner remitted this sum (R. 192), respondent's motion for a new trial was overruled, and judgment was entered in petitioner's favor for the sum of Twenty-five Thousand Dollars ($25,000.00) (R. 192, 193).

Upon appeal to the Supreme Court of Missouri the cause was heard in Division One which ordered the judgment reversed and remanded for a new trial unless petitioner would make a further remittitur of Ten Thousand Dollars ($10,000.00) (R. 218).

> "Considering the evidence favorable to respondent (petitioner in this Court), the verdict is grossly excessive. The trial court ordered a remittitur, but we think the amount remaining is still grossly excessive. If plaintiff will remit $10,000 additional within ten days, the judgment will stand affirmed for $15,000. Otherwise the judgment will stand reversed and the cause will be remanded for a new trial" (R. 218).

Thereupon petitioner "remits $10,000.00 from the judgment herein in accordance with the aforesaid order of this Court" (R. 202). Upon the adoption by the Court en banc of the divisional opinion, petitioner again entered his remittitur in the mentioned sum, and in the same words as hereinabove set out (R. 221).

Petitioner now seeks to have this Court review the action of the Supreme Court of Missouri in ordering a reversal and remanding of this cause unless petitioner remitted $10,000 of the judgment.

SUMMARY OF THE ARGUMENT.

I.

By choosing to enter a remittitur, rather than retry his case, petitioner waived his right to attack the decision of the Supreme Court of Missouri. He cannot retain the benefit of the affirmance of his judgment, which occurred at the time of his entry of the remittitur, and at the same time repudiate his own action which alone made such affirmance possible.

Koenigsberger v. Richmond Silver Mining Co., 158 U. S. 41, 39 L. Ed. 889;

Woodworth v. Chesbrough, 244 U. S. 79, 61 L. Ed. 1005.

II.

There is no federal question presented by the petition herein.

(a) In suits of this character all questions involving substantive law must be determined by the federal law on the subject; whereas questions involving procedure must be decided by the state law.

Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433.

(b) No question of substantive law is presented by the record here. Under Missouri practice one of the necessary requisites for the finality of a verdict for damages for personal injuries is approval by the trial court, and, upon appeal, by the appellate court. This is the state method of determining not whether, but how much, a plaintiff is entitled to recover in a case arising under the Federal Employers' Liability Act.

The question posed by petitioner is, therefore, of necessity a procedural one.

Joice v. M.-K.-T. R. Co., 354 Mo. 439, 189 S. W. 2d 568, 576;

Avance v. Thompson, 320 Ill. App. 406, 51 N. E. 2d 334, 340;

Roy v. Oregon Short Line R. Co., 55 Idaho 404, 42 P. 2d 476 (Cert. denied, Oregon Short Line R. Co. v. Roy, 296 U. S. 479, 80 L. Ed. 409);

Union Pac. R. Co. v. Hadley, 246 U. S. 330, 62 L. Ed. 751, 755.

(c) The action of the Missouri Supreme Court herein is just as much a part of that state's method of determining petitioner's rights under the Federal Employers' Liability Act as is the Missouri practice of permitting three-fourths of the members of the trial jury to return a verdict, Minnesota's practice of permitting five-sixths of the members of a trial jury to return a verdict, or Florida's practice of permitting a jury of fewer than twelve to return a verdict.

M. & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. Ed. 961;

C. & O. R. Co. v. Kelly, 241 U. S. 485, 587, 60 L. Ed. 1117, 1121;

C. & O. R. Co. v. Carnahan, 241 U. S. 241, 242, 60 L. Ed. 979, 981.

(d) But even if the question raised by the petition were one of substance, the opinion attacked does not run counter to the law as announced in the federal courts; and therefore there is no federal question involved here. It is not the federal law that a federal court of appeals lacks jurisdiction to disapprove an excessive verdict.

Koenigsberger v. Richmond Silver Mining Co., supra;

Woodworth v. Chesbrough, supra;
Virginian R. Co. v. Armentrout (4), 166 F. 2d 400, 408.

As approval by a state appellate court is one of the steps in the enforcement of plaintiff's right, so is the approval by a federal court of appeals one of the steps in the enforcement of plaintiff's right. It may be that the power of approval in the one case is supported by slightly different reasoning and is exercised in a different manner; but the point is that the right exists in both instances. So long as it exists in both courts the manner of its exercise becomes procedural.

ARGUMENT.

I.

The Supreme Court of Missouri determined, as it had a right under state law to do, that the damages awarded to the petitioner in the trial court were excessive. The well-established practice in the Missouri appellate courts, where it is found that a judgment is excessive and the error can be cured by remittitur, is to reverse and remand for a new trial unless a remittitur shall be filed. Joice v. M.-K.-T. R. Co., 354 Mo. 439, 189 S. W. 2d 568; Jones v. Pennsylvania R. Co., 354 Mo. 439, 182 S. W. 2d 157.

If petitioner had chosen not to enter the remittitur, the cause would have been reversed and remanded for a new trial (R. 217-218) and petitioner, as he concedes (Brief, p. 6), would have had no right of review in this Court because of the lack of a final judgment. Petitioner, however, seeks to create a right of review where none would otherwise exist, by the expedient of voluntarily converting the non-appealable, conditional judgment or order of the Supreme Court of Missouri into a final judgment through voluntarily accepting the terms thereof, i. e., entering his remittitur, and then, after having the judgment made final in this manner, rejecting the condition upon which it became final. Petitioner seeks to accept the benefit of the action of the Supreme Court of Missouri in affirming the judgment by maintaining a tight grasp upon the $15,000.00 for which it was affirmed with one hand, while with the other he attacks the sole condition upon which he was permitted to keep the $15,000.00. In short, petitioner is endeavoring to retain the benefit of the Court's action while avoiding the detriment, even though the sole condition upon which he was allowed to retain it was his acceptance of the detriment.

Petitioner voluntarily entered a remittitur in order to avoid a new trial ordered for an otherwise reversible error, and by so doing waived his right to object. Koenigsberger v. Richmond Silver Mining Co., 158 U. S. 41, 39 L. Ed. 889; Woodworth v. Chesbrough, 244 U. S. 79, 61 L. Ed. 1005.

The principle controlling in the instant case is set out in the Koenigsberger case, supra. In that case the plaintiff recovered a judgment in the trial court. On appeal the judgment was affirmed for one-half the amount of the verdict, provided the plaintiff would consent to remit the balance within ten days. Thereupon plaintiff filed a remittitur for one-half the amount of the judgment and each party sued out a writ of error.

This Court, speaking through Mr. Justice Gray, said:

> "The plaintiff, by not insisting on the alternative, allowed him by the court, of having a new trial of the whole case, but electing the other alternative allowed, of filing a remittitur of half the amount of the original judgment, and thereupon moving for and obtaining an affirmance of that judgment as to the other half, waived all right to object to the order of the court, of the benefit of which he had availed himself."

In Woodworth v. Chesbrough, supra, this Court again announced the same principle now contended for by respondent. In that case plaintiff had recovered a judgment and verdict in the trial court which the appellate court decided was excessive. Plaintiff was permitted, in order to avoid a retrial, to file a remission of the excess. The remittitur recited that it was done in compliance with the opinion of the appellate court

> "for the sole purpose of obtaining an entry of final judgment . . . and of securing the affirmance of

> that part of the judgment which is not so remitted, and is intended to be without prejudice to plaintiff in any cross proceeding hereafter prosecuted by him before the Supreme Court of the United States . . . in connection with any proceeding prosecuted in that court by defendant for the purpose of reviewing said judgment of the Circuit Court of Appeals."

In assertion of the right thus attempted to be reserved, plaintiff sued out a writ of error. This Court sustained a motion to dismiss, saying that:

> "Woodworth is in the somewhat anomalous position of having secured a judgment against Chesbrough, and yet seeking to retract the condition upon which it was obtained. This he cannot do. (Citing the Koenigsberger case, supra.) He encounters, besides, another obstacle: **If the remittitur be disregarded, the judgment entered upon it must be disregarded and the original judgment of the Circuit Court of Appeals restored; which, not being final, cannot be reviewed.**" (Emphasis supplied.)

Petitioner impliedly concedes the validity of the principle announced in the Koenigsberger and Woodworth cases, supra, but says (Brief p. 3) that a distinction is to be made because he did not seek permission to file a remittitur as was done in those cases. He claims, in effect, that this takes his case out of the general rule.

The short answer to that contention is that the facts are not as stated in his brief. In the Koenigsberger Case the judgment was that plaintiff could enter a remittitur or retry his case. He chose the remittitur. In the Woodworth Case the judgment was one of reversal and remanding, and plaintiff sought and obtained permission of the court to enter a remittitur rather than retry his case. It

is clear that there is not the slightest distinction to be made between this case and either the Koenigsberger or the Woodworth Case.

Petitioner assigns no valid reason why there should be an exception to that rule nor can he do so. He voluntarily chose to forgive a portion of his judgment rather than hazard all upon a retrial.

II.

Petitioner's contention is that in actions arising under the Federal Employers' Liability Act, state appellate courts have no authority or jurisdiction in excessive verdict cases to require a remittitur as a condition of affirmance of the judgment. The basis of this contention is that such action allegedly involves a question of substantive law which must be determined in accordance with the principles of law as administered in the federal courts; that federal appellate courts cannot, in such cases, require a remittitur as a condition of affirmance, and that, therefore, state appellate courts should not be permitted to do so.

(a) It is, of course, well established that in actions in the state courts arising under the Federal Employers' Liability Act, all questions of substantive law must be decided in accordance with federal rules of decisions, whereas questions of procedural law may be decided in accordance with the state law. Central Vermont R. Co. v. White, 238 U. S. 501, 511, 59 L. Ed. 1433, 1436.

By definition, "practice" and "procedure" are generally understood to include the mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or declares the right. Barker v. St. Louis County, 340 Mo. 986, 104 S. W. 2d 371, 377, 378.

The petitioner in this case had certain legal rights under the Federal Employers' Liability Act. The enforcement of these legal rights is committed concurrently to the state courts. The method of enforcement of these rights, however, is not prescribed by the Act and it follows, therefore, that the hearing and determination of petitioner's case, not only in the trial court, but also on appeal, must be had in accordance with the rules, principles and precedents governing the practice in the state court.

(b) The final step in the enforcement of a plaintiff's legal right is the affirmance, by the highest appellate court having jurisdiction, of a judgment in his favor. Under the practice in Missouri, as well as in other states, before this final step is taken, the appellate court has the right to determine whether the damages awarded are so excessive as to constitute reversible error, and if it finds that they are, it may require a remittitur of the excess as a condition of affirmance. Joice v. M.-K.-T. R. Co., supra; Jones v. Pennsylvania R. Co., supra. A choice is thus afforded a plaintiff of trying the case over or of curing the otherwise reversible error by remitting the portion of the damages found to be excessive. Such action in no way impairs or interferes with a plaintiff's right to recover a judgment, but is merely one step in the enforcement of his right. It is clearly, therefore, a matter of procedural law to be governed by state law. Union Pacific R. Co. v. Hadley, 246 U. S. 330, 62 L. Ed. 751; Joice v. M.-K.-T. R. Co., supra; Avance v. Thompson, 320 Ill. App. 406, 51 N. E. 2d 334; Roy v. Oregon Short Line R. Co., 55 Idaho 404, 42 P. 2d 476, cert. den. Oregon Short Line R. Co. v. Roy, 296 U. S. 579, 80 L. Ed. 409.

This Court has recognized that the action of a state court in requiring a remittitur as a condition of affirmance in a Federal Employers' Liability Act case is one involving

a question of procedural law. Union Pacific R. R. Co. v. Hadley, supra. That case arose under the Federal Employers' Liability Act and was tried in a Nebraska state court. The trial court reduced plaintiff's verdict from $25,000 to $15,000 and on appeal the Supreme Court of Nebraska ordered a retrial unless a further remittitur was made, thereby reducing the judgment to $13,500. The case was brought to this Court and this Court, through Mr. Justice Holmes, said of the action of the Supreme Court of Nebraska:

> "The court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high."

Clearly, such language would have been inappropriate had this Court considered the action of the state appellate court as having determined a substantive rather than a procedural question.

(c) Moreover, analogous cases may be cited in which it is recognized that the procedural phases of the enforcement of a plaintiff's legal right in a state court action arising under the Federal Employers' Liability Act are governed by state law. As this Court said, in L. & N. R. Co. v. Stewart, 241 U. S. 261, 60 L. Ed. 989:

> "The notion that a substantive right vesting under the law of one jurisdiction cannot be recognized and enforced in another—at least, as between the United States and a state—unless by procedure identical with that of the first, is disposed of in Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. Ed. 961 . . ."

In the Bombolis Case this Court held that a verdict concurred in by fewer than all of the jurors in a state action arising under the Federal Employers' Liability Act is

valid if proper under state law, even though federal courts in the same character of cases require unanimity. For similar holdings, see St. L. & S. F. R. Co. v. Brown, 241 U. S. 223, 60 L. Ed. 966; Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. Ed. 358; Chesapeake & O. R. Co. v. Gainey, 241 U. S. 494, 60 L. Ed. 1124. These holdings are based on the theory that the requirement of the Seventh Amendment to the Federal Constitution, that trial by jury shall be according to the common law—that is, by a unanimous verdict — does not control the state courts, even when enforcing rights under the Federal Employers' Liability Act, and that such courts may, therefore, give effect, in an action under that statute, to a local practice permitting a less than unanimous verdict. Minneapolis & St. L. R. Co. v. Bombolis, supra.

A federal jury consists of twelve members; nevertheless this Court, in C. & O. R. Co. v. Carnahan, 241 U. S. 241, 242, 60 L. Ed. 979, 981, approved the manner of determining damages in Federal Employers' Liability Act cases in the state courts of Florida, where but six persons compose a jury.

Similarly, this Court has held that a state appellate court, in an action arising under the Federal Employers' Liability Act, may grant a partial new trial in accordance with the state practice, or may direct a new trial as to the amount of damages only when affirming on the issue of negligence. Norfolk R. Co. v. Ferebee, 238 U. S. 269, 59 L. Ed. 1303.

(d) It is sometimes stated generally that a federal appellate court has no control over the amount of a verdict rendered in a trial court. Investigation will disclose that this statement is not correct. That power unquestionably resides in the court, but is used sparingly. In both the

Koenigsberger and Woodward cases, supra, trials had been had in federal courts. In both, excessive verdicts had been rendered in the trial courts. In the former the judgment was reversed and remanded unless plaintiff remitted a portion of the damages, while in the latter plaintiff asked for and was given leave to remit a portion of the damages.

It has long been the rule that, in the presence of passion and prejudice on the part of the jury against the losing litigant, the judgment will not be permitted to stand.

New York Central R. Co. v. Johnson, 279 U. S. 310, 73 L. Ed. 706;
Minneapolis & St. Paul R. Co. v. Moquin, 283 U. S. 520, 75 L. Ed. 1243.

The Fourth Circuit Court of Appeals holds, in Virginian R. Co. v. Armentrout, 166 F. 2d 400, 408, that failure of a trial judge to take action to reduce a grossly excessive verdict is an abuse of discretion and reversible error.

So, we have the federal rule that a court of appeals may reverse and remand in case of a verdict resulting from passion and prejudice, and where the trial judge approved an excessive verdict. Jurisdiction over the amount of the verdict is, then, in the federal appellate courts. Whether the action taken is an order of remittitur on pain of a new trial, or an order for a new trial, is merely a difference in the method of reaching the same result, viz., a reduction in the amount of the verdict; merely a difference in the method of enforcing the defendant's right to a lowering of the verdict against him.

Both the federal and state appellate courts have the power to determine the excessiveness of a verdict. Therefore, the manner in which it is exercised by a state court does not pose a question of substance, viz., a federal ques-

tion. It is mere quibbling to say that the method of correcting an excessive verdict is substantive rather than procedural.

Because petitioner's application raises no federal question, it should be denied.

Respectfully submitted,

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